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BEFORE THE FEDERAL ELECTION COMMISSION

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FEDERAL ELECTION  
COMMISSION

In the Matter of

MUR 6598

Andrei Cherny

Andrei for Arizona

and Seth Scott as treasurer

DISMISSAL AND  
CASE CLOSURE UNDER THE  
ENFORCEMENT PRIORITY  
SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include without limitation an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances. The Office of General Counsel has determined that MUR 6598 should not be referred to the Alternative Dispute Resolution Office.

The Office of General Counsel has scored MUR 6598 as a low-rated matter.<sup>1</sup> For the reasons set forth below, the Office of General Counsel recommends that the Commission exercise its prosecutorial discretion to dismiss MUR 6598.

<sup>1</sup>  
from Andrei for Arizona Filed: July 24, 2012.

1 In this matter, the Complainant, Sharon Thomas, alleges that Andrei Cherny<sup>2</sup> and his  
2 principal campaign committee, Andrei for Arizona and Seth Scott in his official capacity as  
3 treasurer (the "Committee"), failed to disclose expenditures for polling or research in violation of  
4 the Act and Commission regulations. Compl. at 1.

5 The Complainant cites to a May 30, 2012, article in the Arizona Capitol Times' Yellow  
6 Sheet Report entitled "His Lunch with Andrei," in which Cherny allegedly "attempted to use a  
7 December, 2011 polling memo to convince another candidate not to run for Congress." *Id.* at 1,  
8 Ex.2. The Complaint alleges that "Cherny's campaign did not report any expenditure in polling  
9 or research" and "[l]ikewise . . . failed to indicate any debts to a polling firm or any other entity."  
10 *Id.* at 1.

11 In its Response, the Committee states that Cherny "personally commissioned an  
12 autodialer poll" in December 2011 to determine the "strength" of his potential opponents. Resp.  
13 at 1. The cost of the poll was "approximately \$3,000," which "Cherny paid for . . . with his  
14 personal funds." *Id.* at 2. The Committee contends that "the results of the Poll were  
15 Mr. Cherny's 'personal property,'" because Cherny "had commissioned the Poll with his  
16 personal funds" during the testing-the-waters phase of his campaign. *Id.* at 3. As such, the  
17 Committee maintains that the poll was "exempt under Section 100.75 from the definition of  
18 'contribution' under [the Act]," and it was "not required to disclose the expenditures in the first  
19 quarterly report." *Id.* Nevertheless, the Committee acknowledges that it "inadvertently failed to  
20 disclose Mr. Cherny's personal expenditure for the Poll" on its original 2012 April Quarterly

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<sup>2</sup> Cherny was an unsuccessful candidate in the 2012 Democratic primary for Arizona's newly-redistricted 9<sup>th</sup> congressional district.

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1 Report, and that it will file an amended report "to disclose fully the Poll and Mr. Cherny's  
2 expenditure in connection therewith."<sup>3</sup> *Id.* at 2.

3 Under the Act and Commission regulations, an individual becomes a candidate for  
4 federal office when he or she receives contributions or makes expenditures in excess of \$5,000.  
5 2 U.S.C. § 431(2); 11 C.F.R. § 100.3. Both 11 C.F.R. §§ 100.72 and 100.131, which are  
6 commonly referred to as the "testing the waters" provisions, exclude from the definitions of  
7 "contribution" and "expenditure" funds received and payments made solely to determine  
8 whether an individual should become a candidate.<sup>4</sup> When filing the first report due after  
9 registering as a political committee, a principal campaign committee must disclose all financial  
10 activity that occurred before registration and before the individual became a candidate (including  
11 any testing the waters activity), beginning with the first date of activity through the end of the  
12 current reporting period. *See* 11 C.F.R. §§ 100.72, 100.131, 101.2(b), 101.3, 104.3(a) and (b).  
13 Committees are required to report contributions from persons other than political committees,  
14 and, for an authorized committee, contributions from the candidate. 2 U.S.C. § 434(b)(2)(A)-  
15 (B).

16 The Committee filed a Statement of Organization, and Cherny filed a Statement of  
17 Candidacy, on February 7, 2012. The Committee filed its initial 2012 April Quarterly Report on  
18 April 15, 2012, in which it did not disclose any expenditures for research or polling during the

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<sup>3</sup> Although the Committee states that it "inadvertently" omitted to include the candidate's contribution to the Committee in its first disclosure report filed with the Commission, it also states in its response that the expenditure made by the candidate was from "personal funds" and, therefore, not a contribution subject to reporting within the meaning of 11 C.F.R. §§ 100.75, 104.3(a)(2). *Resp.* at 3, 4.

<sup>4</sup> "Testing the waters" activities include, but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R. §§ 100.72(a), 100.131(a). However, engaging in those activities alone, without meeting the statutory \$5,000 threshold, does not suffice to qualify an individual as a candidate under the Act. 2 U.S.C. § 431(2); 11 C.F.R. § 100.3.

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1 “testing the waters” period. The Committee filed an Amended 2012 April Quarterly Report on  
2 August 1, 2012, in which it reported an in-kind expenditure from the candidate dated January 1,  
3 2012, for “research,” in the amount of \$2,500. This appears to be an expenditure for the polling  
4 research alleged in the Complaint, and which the Response indicated would be reported in its  
5 forthcoming amended 2012 April Quarterly Report.

6 Because Cherny commissioned the poll to “help him evaluate the viability of his  
7 candidacy,” Resp. at 1, the funds spent on the poll were neither contributions nor expenditures.  
8 See 11 C.F.R. §§ 100.72, 100.131. And under the facts presented in this matter, it appears that  
9 Cherny had not received contributions or made expenditures in excess of \$5,000 at the time the  
10 research poll was commissioned; there is therefore no indication he had become a candidate for  
11 federal office. Thus, the amount spent on polling during this period was not required to be  
12 reported until after he became a candidate. After filing its Statement of Organization, however,  
13 the Committee was required to disclose all financial activity that occurred before its registration.  
14 Therefore, the Committee should have reported the research poll at issue as an in-kind  
15 contribution from the candidate in its initial 2012 April Quarterly Report filed on April 15, 2012.

16 Based on the information supplied in the Complaint and Response, and in the disclosure  
17 reports filed by the Committee, it appears that the alleged failure to report the research poll by  
18 the candidate was subsequently corrected when the Committee reported the candidate’s \$2,500  
19 in-kind contribution for “research” in its amended 2012 April Quarterly Report, filed on August  
20 1, 2012. Therefore, in furtherance of the Commission’s priorities, relative to other matters  
21 pending on the Enforcement docket, the Office of General Counsel believes the Commission  
22 should exercise its prosecutorial discretion and dismiss this matter pursuant to *Heckler v.*

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*Chaney*, 470 U.S. 821 (1985), approve the attached Factual & Legal Analysis and the appropriate letters, and close the file.

**RECOMMENDATIONS**

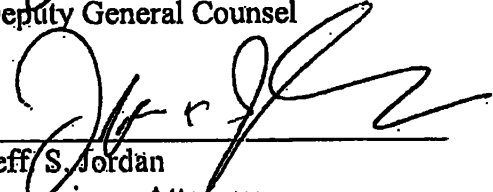
1. Dismiss MUR 6598, pursuant to the Commission's prosecutorial discretion;
2. Approve the attached Factual & Legal Analysis and the appropriate letters; and
3. Close the file.

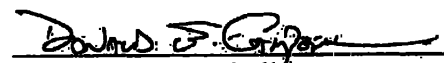
9/12/13  
Date

General Counsel

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